

1  
2  
3  
4  
5  
6 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
7 AT TACOMA

8 MARY S.,

9 Plaintiff,

Case No. C20-5699-MLP

10 v.

ORDER

11 COMMISSIONER OF SOCIAL SECURITY,

12 Defendant.

13  
14 **I. INTRODUCTION**

15 Plaintiff seeks review of the denial of her application for Supplemental Security Income.  
16 Plaintiff contends the administrative law judge (“ALJ”) erred by finding no medically  
17 determinable mental impairment, failing to address a lay witness statement, and improperly  
18 basing the decision on activities of daily living. (Dkt. # 17.) As discussed below, the Court  
19 REVERSES the Commissioner’s final decision and REMANDS the matter for further  
20 administrative proceedings under sentence four of 42 U.S.C. § 405(g).

21 **II. BACKGROUND**

22 Plaintiff was born in 1971, has a high school education, and has worked as a cashier  
23 checker. AR at 23-24. Plaintiff was last gainfully employed in 2009. *Id.* at 37.

1 Plaintiff applied for benefits in January 2018. AR at 15. She alleges disability as of  
2 November 9, 2017. *Id.* After the ALJ conducted a hearing on July 1, 2019, the ALJ issued a  
3 decision on July 29, 2019, finding Plaintiff not disabled. *Id.* at 15-25, 31-60. The ALJ found  
4 Plaintiff had the severe impairments of degenerative disc disease, diabetes, hypothyroidism,  
5 status post stroke, heart disease, and mixed hearing loss in right ear. *Id.* at 18. The ALJ found  
6 Plaintiff had the residual functional capacity (“RFC”) to perform light work, standing and/or  
7 walking six hours per day and sitting six hours per day, with moderate noise levels. *Id.* at 19-20.

8 As the Appeals Council denied Plaintiff’s request for review, the ALJ’s decision is the  
9 Commissioner’s final decision. AR at 1-3. Plaintiff appealed the final decision of the  
10 Commissioner to this Court. (Dkt. # 4.)

### 11 III. LEGAL STANDARDS

12 Under 42 U.S.C. § 405(g), this Court may set aside the Commissioner’s denial of social  
13 security benefits when the ALJ’s findings are based on legal error or not supported by substantial  
14 evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th Cir. 2005). As a  
15 general principle, an ALJ’s error may be deemed harmless where it is “inconsequential to the  
16 ultimate nondisability determination.” *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012)  
17 (cited sources omitted). The Court looks to “the record as a whole to determine whether the error  
18 alters the outcome of the case.” *Id.*

19 “Substantial evidence” is more than a scintilla, less than a preponderance, and is such  
20 relevant evidence as a reasonable mind might accept as adequate to support a conclusion.  
21 *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th  
22 Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in medical  
23 testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*, 53 F.3d

1 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a whole, it may  
2 neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Thomas v.*  
3 *Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is susceptible to more than one  
4 rational interpretation, it is the Commissioner’s conclusion that must be upheld. *Id.*

#### 5 IV. DISCUSSION

##### 6 A. The ALJ Erred in Assessing Plaintiff’s Mental Health Impairments

7 The ALJ found Plaintiff had “no medically determinable mental-health impairment”  
8 because the record showed “no mental-health diagnosis by an acceptable medical source.” AR at  
9 18. However, Plaintiff contends that, because the record shows licensed mental health providers  
10 diagnosed “[m]ajor depressive disorder, recurrent episode, moderate,” and corresponding  
11 symptoms such as tearfulness, the ALJ had a duty to develop the record by ordering a  
12 consultative mental health examination. *Id.* at 459, 480.

13 The Commissioner contends there was no need for the ALJ to order a consultative  
14 examination, because he found the evidence of a mental health impairment did not meet the  
15 durational requirement. Social Security disability can only be based on inability to work due to  
16 impairments that have “lasted or can be expected to last for a continuous period of not less than  
17 12 months” or result in death. 20 C.F.R. § 416.905(a). Plaintiff began treatment in April 2019,  
18 and the available records show treatment through June 2019. AR at 459-85. The Commissioner  
19 notes that the treatment plan had a “Start” date in April 2019 and set a “Target” date for October  
20 2019. *Id.* at 459. However, the target was not a complete cessation of symptoms, but goals such  
21 as to “learn and practice 2-3 skills to assist her with managing her depression” or to “attend and  
22 participate in regularly scheduled counseling...” *Id.* at 460. This does not indicate Plaintiff’s  
23 depression was only expected to last six months. The Commissioner cites the Diagnostic and

1 Statistical Manual of Mental Disorders for typical duration of depression in most individuals, but  
2 that is not evidence regarding *Plaintiff's* depression. (Dkt. # 26 at 7.) Moreover, nothing in the  
3 record suggests Plaintiff's depression began on the date she entered treatment. *See, e.g.*, AR at  
4 474 ("I have been depressed since I was 16."). The ALJ's finding that Plaintiff's mental  
5 impairments did not meet the durational requirement was not supported by substantial evidence.

6 The Commissioner argues the ALJ was not required to order a mental consultative  
7 examination because a claimant bears the burden of proving disability, and Plaintiff made no  
8 request for such an examination. (Dkt. # 26 at 5.)

9 "In Social Security cases the ALJ has a special duty to fully and fairly develop the  
10 record and to assure that the claimant's interests are considered.' This duty exists even when the  
11 claimant is represented by counsel." *Smolen v. Chater*, 80 F.3d 1273, 1288 (9th Cir. 1996)  
12 (quoting *Brown v. Heckler*, 713 F.2d 441, 443 (9th Cir. 1983)). "An ALJ's duty to develop the  
13 record further is triggered only when there is ambiguous evidence or when the record is  
14 inadequate to allow for proper evaluation of the evidence." *Mayes v. Massanari*, 276 F.3d 453,  
15 459-60 (9th Cir. 2001).

16 Social Security regulations require evidence from an acceptable medical source, such as a  
17 physician or psychologist, to establish a medically determinable impairment. 20 C.F.R.  
18 §§ 416.921, 416.902(a). Here, there is no dispute that the diagnosis of major depressive disorder  
19 was made by appropriate state-licensed mental health professionals. *See* AR at 483-85 (diagnosis  
20 by Celeste Cole M.S.W.), 459-62 (diagnosis noted by Autumn Lee, B.A., "as evidenced by  
21 Depressed mood/affect (sad, empty, tearful), Lack of energy, fatigue, Loss of interest or  
22 pleasure..."). Although they were not acceptable medical sources under Social Security  
23 regulations, nothing in the record suggests their diagnosis of depression was inaccurate or

1 invalid. No acceptable medical source suggested depression was not a valid diagnosis. In fact,  
2 Beverly Shapiro, M.D., a consultative physical examiner whose opinion the ALJ found  
3 “persuasive,” observed Plaintiff was “tearful during exam” and recommended a psychiatric  
4 consultation. AR at 22, 300.

5 The uncontradicted diagnosis of major depressive disorder, along with the absence of an  
6 assessment by a medical source who could provide evidence acceptable under Social Security  
7 regulations, created precisely the type of ambiguity or record inadequacy that triggers an ALJ’s  
8 duty to develop the record. The Court concludes the ALJ erred by failing to further develop the  
9 record regarding Plaintiff’s mental health impairments.

10 **B. The ALJ Did Not Harmfully Err in Assessing Activities of Daily Living**

11 The ALJ could only discount Plaintiff’s testimony as to symptom severity by providing  
12 “specific, clear, and convincing” reasons supported by substantial evidence. *Trevizo v. Berryhill*,  
13 871 F.3d 664, 678 (9th Cir. 2017). The ALJ provided several reasons to discount Plaintiff’s  
14 testimony. AR at 22. Plaintiff assigns error to only one reason: inconsistency with her activities.  
15 (Dkt. # 17 at 8-9.) Even if erroneous, any error is harmless because the unchallenged reasons  
16 were clear and convincing. *See Carmickle v. Comm’r, Soc. Sec. Admin.*, 533 F.3d 1155, 1163  
17 (9th Cir. 2008) (inclusion of erroneous reasons to discount claimant’s testimony was harmless  
18 because “remaining valid reasons supporting the ALJ’s determination are not ‘relatively  
19 minor’”).

20 The ALJ’s unchallenged reasons were Plaintiff’s inconsistent statements, mild objective  
21 medical findings, failure to seek treatment, and failure to follow treatment recommendations. AR  
22 at 20-22. These are all valid reasons under Ninth Circuit case law. *See Orn v. Astrue*, 495 F.3d  
23 625, 636 (9th Cir. 2007) (“Factors that an ALJ may consider in weighing a claimant’s credibility

1 include ... inconsistencies in testimony ... and ‘unexplained, or inadequately explained, failure  
2 to seek treatment or follow a prescribed course of treatment.’”) (quoting *Fair v. Bowen*, 885 F.2d  
3 597, 603 (9th Cir. 1989)); *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005) (“Although lack  
4 of medical evidence cannot form the sole basis for discounting pain testimony, it is a factor that  
5 the ALJ can consider in his credibility analysis.”). On reply, Plaintiff challenges lack of medical  
6 treatment as a reason. (Dkt. # 29 at 7.) The Court will not address arguments raised for the first  
7 time on reply. *See Indep. Towers of Wash. v. Wash.*, 350 F.3d 925, 929-30 (9th Cir. 2003) (court  
8 “will not consider any claims that were not actually argued in appellant’s opening brief”).  
9 Moreover, Plaintiff fails to challenge the ALJ’s remaining reasons of inconsistent statements and  
10 lack of supporting medical evidence, which would still suffice.

11 The Court concludes the ALJ did not harmfully err in assessing Plaintiff’s activities of  
12 daily living.

13 **C. The ALJ Did Not Harmfully Err by Not Addressing Lay Witness Statement**

14 The Commissioner concedes the ALJ erred by failing to address Plaintiff’s friend’s lay  
15 witness statement, but contends the error was harmless. “Where lay witness testimony does not  
16 describe any limitations not already described by the claimant, and the ALJ’s well-supported  
17 reasons for rejecting the claimant’s testimony apply equally well to the lay witness testimony, ...  
18 the ALJ’s failure to discuss the lay witness testimony [is not] prejudicial per se.” *Molina*, 674  
19 F.3d at 1117; *see also Valentine v. Comm’r of Soc. Sec.*, 574 F.3d 685, 694 (9th Cir. 2009) (if an  
20 ALJ gave clear and convincing reasons for rejecting the claimant’s testimony, those reasons are  
21 germane to similar testimony by a lay witness).

22 Plaintiff’s friend described walking, standing, sitting, and lifting limitations similar to  
23 Plaintiff’s testimony. AR at 291. Plaintiff offers no argument why the ALJ’s reasons for

1 discounting her testimony do not apply equally well to her friend's statement. The Court  
2 concludes the ALJ's reasons of inconsistent statements, lack of supporting medical evidence, and  
3 failure to follow treatment recommendations suffice to discount the lay witness statement.

4 **V. CONCLUSION**

5 For the foregoing reasons, the Commissioner's final decision is REVERSED, and this  
6 case is REMANDED for further administrative proceedings under sentence four of 42 U.S.C.  
7 § 405(g). On remand, the ALJ should further develop the record regarding Plaintiff's mental  
8 health impairments.

9 Dated this 28th day of May, 2021.

10 

11 MICHELLE L. PETERSON  
12 United States Magistrate Judge  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23